APPEAL NO. 93112

This appeals arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq.* (Vernon Supp. 1993) (1989 Act). On (hearing officer), a contested case hearing (CCH) was held in (City), Texas, with (hearing officer) presiding as hearing officer. The hearing record was left open until January 13, 1993, to allow the inclusion of certain exhibits not available on January 5th. The record was closed on January 13, 1993. The sole issue framed at the CCH was: "[w]hether claimant's cervical condition is related to his accident of (date of injury), or is a pre-existing condition."

The hearing officer determined that the appellant's, claimant herein, cervical condition did not arise out of and in the course and scope of his employment on (date of injury). Claimant filed a timely appeal alleging the hearing officer erred in finding that claimant's preexisting injuries and/or disease of the cervical vertebrae are the sole cause of his present cervical condition and requests that we reverse the hearing officer's decision and render a decision in his favor. Respondent, carrier herein, files a timely response that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

Claimant's attorney filed a timely notice of appeal. Claimant, personally, apart from his attorney also filed a timely notice of appeal. In that both appeals were timely filed, we will consider both as they relate to the issue in this case. We notice, and carrier comments, that claimant's personal appeal covers issues not the subject of this hearing (e.g. "that carrier did not file their dispute in a timely manner"). The Appeals Panel may only consider the record developed at the CCH. Article 8308-6.24 (a). So much of claimant's separate personal appeal which deals with the carrier's timely contest of the compensability of the injury and other matters not contested at the CCH will not be considered. Only those exhibits admitted at the CCH will be considered.

Claimant testified that on (date of injury) while driving one of employer's vehicles he got on a wrong road, lost control of the vehicle and drove it off the side of the road. The accident was the issue in another case, however, the severity of the accident was disputed in this case with the carrier presenting evidence in the form of transcripts and photographs from the prior hearing showing no damage to the car and witness testimony disputing claimant's contentions about the extent of his injuries. Claimant testified that he complained of pain in his neck to the ambulance attendants and to the doctor at Humana Hospital. Claimant admits to injuries in his lower back in 1969, and back surgery in 1973 and 1974. He testified that his neck "went out" while swimming in 1987 and he had a cervical fusion at C6-C7. Claimant testified that although the accident aggravated both his lumbar and cervical problems, his most pressing physical problem after the (date of injury) accident was his neck. Claimant has had surgery on his lumbar spine since the

January 21st accident. Claimant has seen a number of doctors, some as treating doctors, some referral and some at the carrier's request.

Dr. N, a board certified neurological surgeon, examined claimant in November 1990 (two months before the accident at issue) for complaints of pain in his neck and low back. Dr. N found claimant had "cervical spondylosis grade two C5-C6 and cervical spondylosis grade one C4-C5." Dr. N in the deposition on written questions stated claimant's condition was one which would deteriorate. Dr. N also examined claimant in consultation January 28, 1991, following claimant's January 21st accident. Dr. N found no neurological deficit. Subsequently, in comparing an August 1990 MRI with a November 1991 MRI he found them "essentially the same." Dr. N stated in his opinion, based on reasonable medical probability, claimant's automobile accident caused a "temporary aggravation of pre-existing arthritis." In a narrative report dated January 28, 1991, Dr. N stated claimant's "cervical spine . . . indicates spondylosis . . .. However, he is fully recovering, does not appear to have any serious neurologic injury." On a health insurance claims form dated February 14, 1991, Dr. N indicates claimant has "cervical degenerative disc disease [and] Lumbago [with] above diagnoses aggravated by auto accident in Jan. of 1991."

Dr. E treated claimant after the January 21st accident at Humana Hospital. His findings dated February 1, 1991 were "[t]he neck was stiff and painful to move, but did move through full range of motion." In a note dated January 23, 1991, Dr. E notes claimant has a "chronic neck problem" which has been treated on outpatient basis. Dr. Etheridge referred claimant to Dr. S as an outpatient.

Dr. S by letter dated February 7, 1991 with a consultation of January 31, 1991, states claimant complained of "excruciating back pain" and asked for "narcotics which he could use at home." No mention is made of a cervical problem other than to note "a fusion of C6-C7." Dr. S writes Dr. E that he will not be able to care for claimant.

At some point claimant was hospitalized a second time and was treated by Dr. B, Professor of Neurosurgery at UTHSCSA, who evaluated claimant on May 28, 1991 and June 11, 1991. On a medical report form dated May 28, 1991, Dr. B notes claimant's cervical problems may require surgery, and "[a]lthough the patient's cervical symptoms anti-dated his on-the-job injury, I think that it is possible that the on-the-job injury aggravated his cervical symptoms." By letter dated May 28, 1991, Dr. B states "[w]ith reference to the cervical spine, I find that there is a good range of motion . . .." After discussing claimant's cervical problems Dr. B states "[t]his picture is a bit confusing, and suggests old C7 radiculopathy, possibly associated with some new C6 radiculopathy, possibly bilateral" In an addendum dated May 30, 1991, Dr. B reviews some cervical spine films and confirms "some spondylosis at C5-6." On a June 11, 1991 clinic note, Dr. B states "[w]ith regard to his cervical problem, the patient has become more

symptomatic."

Claimant was also seen by Dr. H, who is board certified in neurological surgery. Dr. H in a deposition by written questions (exact date unknown but probably in August 1992) stated an accident like claimant had "could aggravate [claimant's] cervical condition" and he believes claimant's (date of injury) accident "aggravated [claimant's] preexisting cervical condition." Dr. H agrees claimant has a cervical degenerative disc disease which "may continue to deteriorate but in some cases . . . will stabilize." Dr. H believes claimant's neck condition has worsened as a result of his January 21st accident and that his degenerative disease is not the sole cause of his current condition. In various Specific and Subsequent Medical Reports (TWCC-64) dated January 20, 1992, June 19, 1992, August 25, 1992, and November 23, 1992, Dr. Hite's prognosis for claimant is "guarded." In the November TWCC-64 Dr. Hite notes "continued cervical pain" and suggests claimant continue to see Dr. F. Although Dr. F is mentioned in claimant's testimony, no medical record or report from Dr. F was in evidence.

In an MRI report dated November 8, 1991, together with an addendum, Dr. S indicates "[d]isc degeneration and spondylosis, C5 and C6-7 with moderate size defects centrally." The addendum compares claimant's August 23, 1990 MRI with the November 8, 1991 MRI. Dr. S concludes that the 1991 MRI shows the "[s]pondylotic defect C4-C5 . . . slightly more pronounced and/or better demonstrated on the current study otherwise the findings are similar in appearance."

Claimant was seen by Dr. C on August 21, 1991. Dr. C completed an Initial Medical Report (TWCC-61) and comments on the cervical aspects that claimant ". . . has a cervical strain with a possible cervical radiculopathy."

Claimant was seen by Dr. H, a board certified neurological surgeon, apparently on request by the carrier, on April 30, 1992. Dr. H, in response to a deposition on written questions, stated it was his opinion the sole cause of claimant's current condition is his degenerative disease of the cervical spine. Dr. H further opinion, based on reasonable medical probability, upon review of the August 23, 1990 MRI and the November 8, 1991 MRI was that claimant's cervical spine condition had not worsened. Throughout the deposition, Dr. H maintained claimant sustained no aggravation of his cervical condition due to the January 21st car accident, that claimant's cervical condition was the result of natural, continuing degeneration and that claimant's neck condition has not changed between August 23, 1990 and November 8, 1991. Parenthetically we note that carrier at both the CCH and on appeal stresses that Dr. H and Dr. N were the only ". . . medical doctors who saw claimant (who) were privy to all medical records, films, and his long history of cervical problems." We note that Dr. Hardy states in his deposition that he did not have the records of Dr. F, Dr. B, or Dr. S available for review.

The hearing officer correctly stated the law to be, that "[t]o defeat a claim for compensation because of a preexisting injury, the carrier must show that the prior injury was the sole cause of the worker's present incapacity. Texas Employers Insurance Association v. Page, 553 S.W.2d 98 (Tex. 1977)." Texas Workers' Compensation Commission Appeal Nos. 92216, decided July 10, 1992 and 92047, decided March 25, 1992. It is undisputed that claimant had a long history of preexisting cervical and lumbar spine problems. The cervical problems were highlighted when claimant's neck "went out" in 1987 and he subsequently had a cervical fusion of C6-C7. What is in dispute is the severity of the (date of injury) automobile accident, the nature of claimant's cervical spine injuries and whether claimant's present problems are the sole cause of his preexisting condition. An MRI of claimant's cervical spine had been performed on August 23, 1990, some five months before the accident. Claimant had then seen Dr. N in November 1990 with complaints of neck pain. Dr. N at that time had an opportunity to review the August MRI. Dr. N also saw claimant in consultation on January 28, 1991, one week after the accident. Dr. N is fairly clear, in reading his various comments and statements, that he felt claimant had some soreness and stiffness of his neck after the accident, but that this was a temporary aggravation of his preexisting arthritis. It was Dr. N further opinion, upon a later review of an MRI done in November 1991, that claimant's after accident cervical condition was essentially the same as before the accident. Dr. H in reviewing the August 1990 and November 1991 MRIs stated that in reasonable medical probability claimant's cervical condition was the same in each MRI.

We are mindful that claimant complained of neck pain at the time of the accident and during his stay in the hospital after the accident. We note that Dr. N accounts for these complaints as temporary aggravation. We also note, as claimant points out, that Dr. C, seven months after accident, apparently without the benefit of the two MRIs on a TWCC-61 states claimant has a cervical strain. Claimant's strongest case is made by Dr. H who states unequivocally that the January 21st accident aggravated claimant's preexisting cervical condition.

Generally, lay witness testimony can establish a causal connection where, based on common knowledge the fact finder could understand the causal connection. Hernandez v. Texas Employers Insurance Association, 783 S.W.2d 250 (Tex. App.-Corpus Christi 1989, no writ). However, an exception to the well settled general rules is that, when a subject is one of such scientific or technical nature that the trier of fact cannot properly be assumed to have, or to be able to form, opinions of their own based upon the evidence as a whole and aided by their own experience, expert evidence may be essential. Houston General Insurance Co. v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e). In the instant case there was expert evidence both saying that claimant's present condition is the sole cause of a preexisting degenerative cervical condition which would only get worse with time and that an accident aggravated and made worse claimant's preexisting cervical condition. The hearing officer is the trier

of fact in a CCH and is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given the evidence. Article 8308-6.34(e). As such it is within the province of the hearing officer to judge the weight to be given testimony and to resolve conflicts and inconsistencies in the testimony of different witnesses. Tenngasco Gas Gathering Co. v. Fischer, 624 S.W.2d 301 (Tex. App.-Corpus Christi 1981, writ ref'd n.r.e). This rule holds equally true of expert medical testimony. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). When reviewing a question of the factual sufficiency of the evidence to support the hearing officer's determinations, we consider and weigh all the evidence, both in support of and contrary to the challenged findings and uphold those findings unless we determine that the evidence is so weak or the findings so against the great weight and preponderance of the evidence as to manifestly wrong or unjust. *See* In re King's Estate,150 Tex. 662, 244 S.W.2d 660 (1951); Texas Workers' Compensation Commission Appeal No. 9221, decided July 16, 1992. In the present case, the medical evidence was conflicting and that conflict in the medical evidence was for the hearing officer to resolve.

After reviewing the entire record, we conclude that the hearing officer's findings that the carrier sustained its burden of showing claimant's present condition of his cervical vertebrae is essentially the same as it was before the (date of injury) accident, and that claimant's present condition is the sole cause of his preexisting condition, were supported by sufficient evdience and that such findings are not so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust.

The decision of the hearing officer is affirmed.

_____

Thomas A. Knapp
Appeals Judge

CONCUR:

_____

Joe Sebesta
Appeals Judge

_____
Robert W. Potts
Appeals Judge